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No. 89-1257

In the

**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM 1989

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VIRGINIA McMARTIN and
PEGGY ANN BUCKEY,
*Petitioners,*

v.

CHILDREN'S INSTITUTE INTERNATIONAL,
and KATHLEEN "KEE" MACFARLANE,
*Respondents.*

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**ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION FIVE**

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# BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## RESPONDENTS' RESTATEMENT OF THE QUESTION PRESENTED

Whether the California Court of Appeal correctly held that therapists who had been retained by a prosecutor to evaluate claims of child abuse and to assist the prosecutor in determining whether to initiate criminal proceedings were entitled to prosecutorial immunity under federal law from actions under 42 U.S.C. Section 1983 under the facts pleaded by Petitioners.

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## JURISDICTION

The judgment of the Court of Appeal of California, Second Appellate District, Division Five, was entered on August 10, 1989, affirming dismissal of petitioners' action. On November 1, 1989 the Supreme Court of California denied a petition for review. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

## STATUTE INVOLVED

42 U.S.C. § 1983 reads as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

## STATEMENT OF THE CASE

Petitioners Virginia McMartin and Peggy-Ann Buckey, formerly teachers at the McMartin Preschool in Manhattan Beach, California, were indicted by the Los Angeles County Grand Jury on March 22, 1984 for participating in lewd or lascivious acts with McMartin preschoolers in violation of California Penal Code Section 288(a). After an 18-month preliminary hearing, Petitioners and their five codefendants were bound over for trial.[1]

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[1]This required a finding by the presiding Magistrate that there was sufficient cause to believe that a public offense had been committed and that Petitioners were guilty thereof. California Penal

The Los Angeles County District Attorney dismissed the charges against Petitioners and three of their codefendants on January 21, 1986.

Respondent Children's Institute International ("CII"), a nonprofit child welfare organization, first became involved in the McMartin Preschool prosecution at the specific request of the Los Angeles County District Attorney. CII personnel, including the chief of its child abuse diagnostic unit, Respondent Kathleen MacFarlane, were enlisted to evaluate former McMartin Preschool students, including those who ultimately testified against Petitioners at their preliminary hearing.

Petitioners' state court civil action against Respondents arose from the professional services that Respondents rendered to the District Attorney. Petitioners' first amended complaint alleged in Paragraph 3 that the Los Angeles County District Attorney and the Manhattan Beach Police "retained" CII after the District Attorney had commenced his involvement in the case "to interview, examine, interrogate and evaluate the alleged victims of child abuse." Petition ("Pet.") pp. E4-E6. That same paragraph stated that CII's mission was to determine "whether child abuse had occurred and who the perpetrators were." In Paragraph 6, Petitioners claimed that CII's allegedly unfounded suspicions of child abuse were reported to the authorities. Pet. pp. E6-E8. Paragraph 7 alleged that the District Attorney based his decision to indict Petitioners, *inter alia*, "[on] the reports of [CII and its agents]." Pet. p. E8.

On this basis, Petitioners alleged against CII,

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Code Section 872.

Ms. MacFarlane, the County of Los Angeles and others a variety of state law tort claims, a RICO claim and a claim purportedly brought under 42 U.S.C. Section 1983. Respondents demurred to the Section 1983 claim on the ground that they were absolutely immune from Section 1983 liability because, since they were charged with acting in a quasi-prosecutorial capacity, that conduct was absolutely privileged. The Los Angeles County Superior Court sustained the demurrer without leave to amend. The California Court of Appeal affirmed in a published decision. McMartin v. Children's Institute International, 212 Cal. App. 3d 1393 (1989). The California Supreme Court denied review on November 1, 1989.

## ARGUMENT

### THIS IS NOT AN APPROPRIATE CASE FOR SUPREME COURT REVIEW

Rule 17 of the Supreme Court Rules provides that "review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor." In describing general guidelines for the court's exercise of its discretion, the rule states in relevant part that certiorari is most likely to be granted:

> (b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.
>
> (c) When a state court or federal court of appeals has decided an important question of federal law which has not been, but should

be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

None of these circumstances is present in this case.

A. The California Court Of Appeal's Decision Is Wholly Consistent With Federal Law.

A prosecutor is absolutely immune from Section 1983 claims for actions that are "intimately associated with the judicial phase of the criminal process . . . ." Imbler v. Pachtman, 424 U.S. 409, 430 (1976). Here, Respondents were deputized by the prosecutor to interview and evaluate potential witnesses and assist in determining whether, and against whom, to initiate criminal proceedings. Petitioners concede that "[t]he scope of immunity available to Respondents is analogous to that of the prosecutor under Imbler . . . ." Pet. p. 17. Accordingly, the California court correctly held that Respondents enjoy absolute prosecutorial immunity under the facts pleaded by Petitioners.

The decision below is consistent with the application of Imbler by other federal courts faced with similar claims as made here against therapists and other child welfare workers. For example, in Myers v. Morris, 810 F.2d 1437 (8th Cir.), cert. denied 484 U.S. 828 (1987), a county prosecutor was sued under 42 U.S.C. Section 1983 for, inter alia, "questioning children . . . [and using] the interviews to coerce perjured statements from young and vulnerable witnesses." Id. at 1449-1450. The 10th Circuit held that such activity was absolutely immune from Section 1983 liability because conferring with potential witnesses for the purpose of determining whether to initiate proceedings and following up on leads

presented in interviews to "[determine] the complicity of others," Id. at 1451, were "an integral part of [the prosecutor's] advocatory functions, i.e., her ongoing prosecutorial responsibilities to decide whom to charge and to prepare for the presentation of her cases." Id. See also Coverdell v. Department of Social and Health Services, 834 F.2d 758 (9th Cir. 1987) (social worker who gave affidavit to prosecutor who based a dependency court filing on it entitled to absolute immunity from Section 1983 claims); Meyers v. Contra Costa County Department Of Social Services, 812 F.2d 1154 (9th Cir.), cert. denied 484 U.S. 829 (1987) (social worker who supervised an investigation and filed a petition in dependency court entitled to absolute immunity from Section 1983 claims for those actions); Mazor v. Shelton, 637 F. Supp. 330 (N.D. Cal. 1986) (social worker who made a report to a sheriff who took a child into custody entitled to absolute immunity from Section 1983 claims; but see Doe v. County of Suffolk, 494 F. Supp. 179 (E.D.N.Y. 1980) (social worker not absolutely immune from Section 1983 liability for filing a Family Court petition charging child neglect).

Citing England v. Hendricks, 880 F.2d 281 (10th Cir. 1989) (a municipality's failure to train may serve as a basis for Section 1983 liability in some circumstances) and City of Canton, Ohio v. Harris, ____ U.S. ____, 109 S. Ct. 1197 (1989) (District Attorney's statements to the press entitled at most to qualified immunity), petitioners appear to argue that the California court erred by ignoring exceptions to the Imbler rule. However, it is clear from Petitioners' complaint why they could not and cannot bring into play theories of liability derived from City of Canton or England: the only act undertaken by CII under

color of state law[2] was its advice to the District Attorney that charges be brought -- not Ms. MacFarlane's alleged unauthorized disclosures to a reporter, or CII's failure to train its personnel.[3] Indeed, only CII's evaluation of the complaining children contributed to the injury that Petitioners seek to redress, as the California court

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[2]Petitioners described their Section 1983 injury thusly:

> "Specifically, Plaintiff alleges that with respect to the events alleged in paragraph 19, each of the Defendants, acted under color of state law, as a matter of governmental policy of CITY and COUNTY, recklessly and in a gross and negligent manner, and with deliberate indifference towards Plaintiffs' rights, privileges, and immunities, and filed to protect Plaintiff with procedural due process, inflicted cruel and unusual punishment upon Plaintiff while in Defendants' custody and control and failed to follow Defendants' own statutory and regulatory requirements designed to protect Plaintiff as required by law and as comparable to that which Defendants made available to other similarly situated persons within Defendants' jurisdiction." Pet. pp. E17-E18.

[3]Even if Respondents' advice to the prosecutor was made in bad faith and in violation of "substantially all standards for interviewing alleged child abuse victims," Pet. p. E7, Petitioners' complaint is no more worthy of review than Schoenfield v. County of Humboldt, 875 F.2d 870 (9th Cir.), cert. denied, 58 U.S.L.W. 3468 (U.S. Jan. 22, 1990). Petitioners dismiss the denial of a petition for a writ of certiorari in that case by characterizing Schoenfield as "essentially a malicious prosecution case with some failure to train allegations," Pet., p. 12. That description aptly describes their own complaint.

observed:

> "[Petitioners'] complaint alleged only that [Respondents'] role in contributing to the injury complained of was their advice to the District Attorney that criminal charges should be brought." 212 Cal. App. 3d at 1405; Pet. pp. B31-B32.

Equally important, the California court's opinion clearly shows that Petitioners were given every opportunity to amend their first amended complaint to plead facts alleging nonprivileged conduct actionable under Section 1983, but they were unable to do so.

> "[Petitioners] have failed to demonstrate, by proposed amendments to their pleadings, their briefs or in oral argument, that other facts or circumstances exist, either prior to or after the [Respondents'] alleged prosecutorial conduct, that would deny defendants the protection of the immunity provided for such legally sanctioned activity . . . . " 212 Cal. App. 3d at 1405; Pet. p. B32.

Having failed to convince the trial court and the California Court of Appeal that they can amend their complaint to state a viable claim against Respondents, Petitioners now in effect ask the United States Supreme Court to decide whether to give them a third chance to amend. That question is manifestly inappropriate for Supreme Court review.

B. The State Court Did Not Decide An Important Or Unsettled Question Of Federal Law.

Petitioners improperly attempt to characterize the Court of Appeal's decision as one deciding an important federal issue by stating the question presented for review as: "Whether the California Child Abuse and Neglect Reporting Act, California Penal Code § 11164 et seq., provides complete immunity from liability for any and all claims arising under the Federal Civil Rights Act of 1871, 42 U.S.C. § 1983, as alleged in Petitioners' First Amended Complaint." Pet. p. i. But that issue is not present anywhere in this case.

The question argued in respondents' demurrer to the first amended complaint and the issue decided by the California Court of Appeal was whether petitioners' 42 U.S.C. § 1983 claims are barred by respondents' absolute federal immunity. Res. App. A. The Court of Appeal, applying only established federal law, held that respondents are entitled to absolute immunity from claims made under 42 U.S.C. § 1983. Pet. pp. B29-B31.

The California Court of Appeal did not consider or decide the scope of the relationship, if any, between Respondents' absolute immunity under federal law and the absolute immunity provided by California Penal Code Section 11164. The "question presented" as stated by Petitioners is hypothetical, not real.

## CONCLUSION

This Court has consistently refused to grant a writ of certiorari "except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties." Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387, 393 (1923). This petition presents no unsettled issues of federal law or issues of public importance. Accordingly, the Petition For Writ Of Certiorari should be denied.

DATED: March 5, 1990

Respectfully submitted,

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# *APPENDIX A*

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

| | |
|---|---|
| VIRGINIA McMARTIN and PEGGY-ANN BUCKEY,<br><br>Plaintiffs,<br><br>vs.<br><br>COUNTY OF LOS ANGELES; CITY OF MANHATTAN BEACH; CHILDREN'S INSTITUTE INTERNATIONAL; KATHLEEN "KEE" ASTRIDHAGAR, BRUCE WOODLINE; ROBERT PHILOBOSIAN; WAYNE SATZ; ABC TELEVISION, DOES 1 THROUGH 200<br><br>Defendants. | Case No. C 601854<br><br>MEMORANDUM OF POINTS AND AUTHORITIES OF DEFENDANTS CHILDREN'S INSTITUTE INTERNATIONAL AND KATHLEEN MAC FARLANE IN SUPPORT OF DEMURER TO FIRST AMENDED COMPLAINT<br><br>DATE: October 23, 1987<br>TIME: 9:00 A.M.<br>DEPT: 84<br>TRIAL DATE: None<br><br>[JUDGE TURNER, DEPT. 83 HAS RECUSED PURSUANT TO C.C.P. § 170 (a) (b) (c)] |

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## I. PRELIMINARY STATEMENT AND SUMMARY OF ARGUMENT

Plaintiffs Virginia McMartin and Peggy-Ann Buckey, formerly teachers at the McMartin Preschool in Manhattan Beach, California, were indicted by the Los Angeles County Grand Jury on March 22, 1984 for participating in the molestation of numerous McMartin preschoolers in violation of Penal Code Section 288(a) (lewd or lascivious act on a child under 14 years old). After an 18-month preliminary hearing, plaintiffs and their five codefendants were bound over for trial, plaintiffs for a number of counts of violation of Penal Code 288(a) and one count of violation of Penal Code Section 182 (conspiracy). The Los Angeles County District Attorney dismissed the charges against plaintiffs on January 21, 1986.[4]

By this action, plaintiffs seek retribution from those they perceive as responsible for the institution of criminal proceedings against them, including the physicians and psychotherapists of Children's Institute International ("CII") who assisted the prosecution in uncovering the McMartin Preschool molestations. CII, a nonprofit child welfare organization which for the past sixty years has dedicated itself to preserving families through the treatment and prevention of child abuse and neglect, first became involved in the McMartin Preschool prosecution at the specific request of the Los Angeles County District Attorney. CII personnel including defendant Kathleen MacFarlane, were enlisted in October, 1983 to conduct diagnostic evaluations of several former McMartin

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[4]See People v. Buckey, et al., Los Angeles Municipal Court Case Nos. A 753005 and A 750900.

Preschool students. During the ensuing months, nearly 400 former McMartin students, including those who testified against plaintiffs at their preliminary hearing, were seen by CII therapists and/or physicians. Throughout the evaluation process CII complied with the provisions of California Penal Code Section 11166 requiring it to report any instances of suspected child abuse to the proper authorities.

The sole ostensible basis for plaintiffs' suit against CII[5] is the Section 11166 reports of suspected child abuse naming plaintiffs that CII personnel prepared for and furnished to the District Attorney in connection with the investigation and prosecution of the McMartin defendants. Thus, the amended complaint alleges in paragraph 4 that the Los Angeles District Attorney "retained" CII "to interview, examine, interrogate and evaluate the alleged victims of child abuse." That same paragraph stated that CII's mission was to determine "whether child abuse had occurred and who the perpetrators were." In paragraph 6, plaintiffs claim that CII's allegedly unfounded suspicions of child abuse were reported to the authorities. Paragraph 7 alleges that the District Attorney based his decision to indict plaintiffs, inter alia, "[on] the reports of [CII and its agents]."

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[5]Although the particular target defendants in some of plaintiffs' thirteen causes of action are not clearly identified, plaintiffs appear to allege state law causes of action against CII for defamation (eighth cause of action), intentional infliction of emotional distress (seventh cause of action), conspiracy (third cause of action), battery (eleventh cause of action), interference with prospective advantage (twelfth cause of action), invasion of privacy (tenth cause of action), negligent infliction of emotional distress (thirteenth cause of action), and declaratory relief (fourth cause of action). Plaintiffs also allege claims under 42 U.S.C. § 1983 (second cause of action) and 18 U.S.C. §§ 1961 et seq. (RICO) (fifth cause of action).

As Judge Woods ruled in disposing of nearly identical complaints filed by two of plaintiffs' codefendants,[6] the reports of suspected child abuse on which plaintiffs seeks to predicate CII's liability are reports that CII was engaged by the District Attorney to make and which CII would have been compelled to make pursuant to the mandatory child abuse reporting requirements contained in Penal Code Section 11166. These reports serve a compelling public interest, and accordingly, CII was absolutely privileged to make them. There is no cognizable basis for plaintiffs' claim against CII, and CII's demurrers should therefore be sustained.

## II. PLAINTIFFS' STATE LAW CLAIMS ARE INSUFFICIENT BECAUSE EACH IS BASED ON REPORTS OF SUSPECTED CHILD ABUSE THAT CII WAS ABSOLUTELY PRIVILEGED TO MAKE UNDER CALIFORNIA PENAL CODE SECTION 11172

Penal Code Section 11166 requires any child welfare worker such as the CII therapists that interviewed the McMartin youngsters to "report [any] known or suspected instance of child abuse to a child protective agency immediately. . . ." The failure to make such a report is a misdemeanor under Penal Code Section 11172(e). Plaintiffs' complaint makes clear that it was a series of such reports produced by CII that led to plaintiffs'

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[6] See Notices of Ruling, filed September 14, 1987 in Spitler v. Los Angeles, (L.A. Super. No. 603958) and Jackson v. Los Angeles, (L.A. Super. No. 619156), of which the Court has been requested to take judicial notice, copies of which are attached as Exhibit B.

indictment and the injuries for which they seek redress here.

The Child Abuse Reporting Law extends to a "child care custodian, medical practitioner, nonmedical practitioner, or employee of a child protective agency." Penal Code § 11166. To be a "child care custodian," the facilities need only be licensed to care for children. Id. § 11165.

CII is such an institution. The Court has before it on CII's request for judicial notice pursuant to Evidence Code Section 452, licenses continuously in effect since 1981 to operate a community clinic for the psychological treatment of (among others) children; and since 1982 to operate a residential group home for the treatment and care of children. (Exhibit A to the Request to Take Judicial Notice.)[7] These licenses conclusively establish CII as a "child care custodian," defined by the statute to mean a "community care facilit[y] licensed to care for children." See Penal Code § 11165.

It is now clear beyond cavil that reports of suspected child abuse made by a child care custodian pursuant to Penal Code Section 11166 are absolutely privileged:

> "No child care custodian, medical practitioner, nonmedical practitioner, or employee of a child protective agency who reports a known or suspected instance of child abuse shall be civilly or criminally liable for any report required or authorized by this

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[7]Although not immediately relevant for purposes of this suit but noted for sake of completeness, CII has also been licensed since 1986 to operate an extended day care facility for 35 children.

article." Penal Code § 11172(a).

As the decision in Storch v. Silverman, 186 Cal. App. 3d 671 (1986), makes clear, Penal Code Section 11172 admits of no ambiguity concerning the immunity that attaches to the making of a report of suspected child abuse. Storch was an action for medical malpractice and negligent infliction of emotional distress based on an allegedly negligent diagnosis that a child was a victim of abuse, and on a report under Penal Code Section 11166 of such abuse. The court held that Penal Code Section 11172 provides "mandated reporter[s]" absolute immunity from civil liability for reporting an instance of suspected child abuse -- even if the report is "maliciously and knowingly . . . false." 186 Cal. App. 3d at 681. Justice Arabian wrote (at p. 682):

> "It is evident that, in the tension between the grant of civil immunity occasioned by a duty to report and the specter of a false report, some sacrifice is borne by those who may be wrongfully investigated but unable to seek legal redress.
>
> " . . .
>
> "In the enactment of the Child Abuse Reporting Law, [the Legislature] has wisely provided a haven of refuge to those who rescue the helpless.
>
> "When engaged in the alleviation of pain from those who suffer, the law knows no finer hour."

Storch is indistinguishable from the allegations here. As in Storch, plaintiffs allege damages flowing from mandated reports of child abuse. As in Storch, plaintiffs claim that the reports were false. Hence, as did the trial

court in Storch, the claims of plaintiffs must be dismissed.

This result is not altered by plaintiffs' allegation that CII's conclusions were based on allegedly unprofessional interviewing techniques. For as Judge Arabian made clear in Storch, immunity does not turn on whether the report of child abuse is accurate or whether it is founded on a legitimate basis. The Storch plaintiffs had similarly urged that because immunity exists only for "required reports" of child abuse and because only instances of abuse that the reporter "knows [of] or reasonably suspects" need be reported, immunity did not extend to reports that are "negligent or knowingly false." 186 Cal. App. 3d at 678. The Court of Appeal rejected this argument, noting that because "[t]he issue of the reasonableness of the reporter's suspicions would potentially exist in every reported case," the proposed construction would "render[] the immunity statute virtually meaningless." In language instructive here, the court added:

> "The legislative scheme is designed to encourage the reporting of child abuse to the greatest extent possible to prevent further abuse. Reporters are required to report child abuse promptly and they are subject of criminal prosecution if they fail to report as required. Accordingly, absolute immunity from liability for all reports is consistent with that scheme. Id. at 678-79.

## III. PLAINTIFFS' STATE LAW CLAIMS ARE INSUFFICIENT FOR THE ADDITIONAL REASON THAT CII'S REPORTS ARE ABSOLUTELY PRIVILEGED UNDER CALIFORNIA CIVIL CODE SECTION 47(2) AS HAVING BEEN MADE IN CONNECTION WITH AN ONGOING CRIMINAL INVESTIGATION

### A. CII's Actions And Reports That Form The Bases Of Plaintiffs' State Law Claims Are Absolutely Privileged Under Civil Code Section 47(2)

Plaintiffs acknowledge that CII's reports were made at the request of the District Attorney who relied on them rather than conduct his own investigation. (Amended Complaint ¶¶ 4 & 7.) Reports made in these circumstances form part of the preparation of a criminal prosecution and are absolutely privileged under Civil Code Section 47(2).[8]

The absolute privilege of Civil Code Section 47(2) "attaches to any publication that has any reasonable relation to the action and is made to achieve the objects of the litigation, even though published outside the courtroom and no function of the court or its officers is involved." Rosenthal v. Irell & Manella, 135 Cal. App. 3d 121, 126 (1982). When a publication is absolutely privileged, "there is no liability, even though it is made with

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[8]Civil Code Section 47(2) provides in part that:

> "a privileged publication or broadcast is one made . . . [in] any . . . judicial proceeding . . . ."

actual malice. . . ." Berman v. RCA Auto Corp., 177 Cal. App. 3d 321, 325 (1986).

Block v. Sacramento Clinical Labs, Inc., 131 Cal. App. 3d 386 (1982), is on all fours with the facts alleged by plaintiffs. Block, was an action for "professional negligence." The San Joaquin County Sheriff-Coroner, as part of its investigation into the death of a child, submitted blood samples to private toxicological laboratory for analysis. Incorrect results were communicated to the District Attorney who used them as the basis for charges of murder and child neglect. The error was discovered at the preliminary hearing and the criminal complaint was dismissed on the District Attorney's motion. The defendant then sued those responsible for her prosecution, including the private laboratory which had prepared the erroneous report. 131 Cal. App. 3d at 387-88.

On appeal from an order sustaining demurrers to the complaint, the Court of Appeal held that the communication between the private laboratory and the authorities -- the injurious falsehood on which the lawsuit was based -- was absolutely privileged under Civil Code Section 47(2):

> "[The toxicologist] performed and communicated the calculations upon the request of the office of the district attorney in furtherance of its investigation whether there was probable cause to initiate criminal charges relating to the infant's death. [W]hen the communication has some relation to a proceeding that is actually contemplated in good faith and under serious consideration by . . . a possible party to the proceeding, the communication is privileged. (Rest. 2d Torts, supra, § 588, com. e, at p. 251; see Izzi v.

> Rellas (1980) 104 Cal. App. 3d 254 at p. 262 [163 Cal. Rptr. 689] ['the working definition of 'judicial proceedings' . . . include[s] proceedings which have the real potential for becoming a court concern.']; Ascherman v. Natanson (1972) 23 Cal. App. 3d 861, 865 [100 Cal. Rptr. 656] ['it is . . . well settled that the absolute privilege in both judicial and quasi-judicial proceedings extends to preliminary conversations and interviews between a prospective witness and an attorney if they are in some way related to or connected with a pending or contemplated action. [Citations.]'] And, notwithstanding that the privilege is most often asserted in civil disputes, the privilege is applicable to 'proposed litigation, either civil or criminal.' (Rest. 2d Torts, supra, § 588, com. b, at p. 250.)"

131 Cal. App. 3d at 393-394.

As in Block and Storch, plaintiffs charge the investigator (CII) with the communication of erroneous information to the prosecuting authorities in connection with a contemplated criminal proceeding. CII's communications to the District Attorney in the McMartin criminal case -- even if incorrect -- are absolutely privileged under Civil Code Section 47(2).

B. The Absolute Privilege Of Civil Code Section 47(2) Bars All Of Plaintiffs' State Law Claims

The decision in Block makes it manifestly clear that the absolute privilege of Civil Code Section 47 bars all of plaintiffs' state law causes of action -- regardless of their title or nature.

> "Subsequent cases [to Albertson v. Raboff, 46 Cal. 2d 375 (1956)] have applied the privilege to defeat tort actions which, however labelled and whatever the theory of liability, are predicated upon the publication in protected proceedings of an injurious falsehood."

131 Cal. App. 3d at 390-91 (footnotes omitted). The cases cited in Block cover the spectrum of intentional and negligent torts alleged in the causes of action directed toward CII. See Rivas v. Clark, 38 Cal. 3d 355 (1985) (intentional infliction of emotional distress and invasion of privacy); Agostini v. Strycula, 231 Cal. App. 2d 804 (1965) (inducing breach of contract); Kachig v. Boothe, 22 Cal. App. 3d 626 (1971) (infliction of mental distress); Pettitt v. Levy, 28 Cal. App. 3d 484 (1972) (fraud, negligent misrepresentations, negligence and intentional infliction of emotional distress); Scott v. McDonnell Douglas Corp., 37 Cal. App. 3d 277 (1974) (defamation, interference with contractual relationship and intentional infliction of emotional distress); Lerette v. Dean Witter Organization, Inc., 60 Cal. App. 3d 573 (1976) (intentional infliction of emotional distress); Brody v. Montalbano, 87 Cal. App. 3d 725 (1978) (interference with prospective economic advantage); Portman v. George McDonald Law Corp., 99 Cal. App. 3d 988 (1979) (negligent misrepresentation); Rosenthal v. Irell & Manella, 135 Cal. App. 3d 121 (1982) (intentional infliction of emotional distress, inducing breach of contract, interference with prospective economic advantage); and Lebbos v. State Bar, 165 Cal. App. 3d 656 (1985) (interference with contractual relations, interference with prospective economic advantage, intentional infliction of emotional distress and negligence).

## IV. PLAINTIFFS' 42 U.S.C. SECTION 1983 AND CONSPIRACY CAUSES OF ACTION AGAINST CII ARE BARRED BY CII'S ABSOLUTE FEDERAL IMMUNITY

Plaintiffs allege that CII was retained to "assess[] whether in fact child abuse had occurred, the nature thereof and the identity of the perpetrator." (Amended Complaint ¶ 5.) This information was sought by the District Attorney, the complaint alleges, to assist in deciding whether "to present to [the] Grand Jury the name of Plaintiff [sic], among others, for indictment for the alleged child abuse at Preschool." (Id. ¶ 7.) Based on these allegations, plaintiffs contend that CII acted under color of state law -- specifically, as an investigative arm of the District Attorney -- and thus can be held accountable under federal law for violating their civil rights.

But viewed as an adjunct of the prosecution, as plaintiffs allege, CII is entitled to the same immunity from 42 U.S.C. Section 1983 claims as the District Attorney enjoys in performing its investigatory and prosecutorial functions.[9] See, e.g., Lawyer v. Kernodle, 721 F.2d 632,

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[9]42 U.S.C. 1983 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

635 (8th Cir. 1983) (physician engaged by county coroner to perform autopsy "clearly enjoyed the same [Section 1983] immunity privilege the coroner could assert").

A prosecutor is absolutely immune from Section 1983 claims based on actions that are "intimately associated with the judicial phase of the criminal process . . . ." Imbler v. Pachtman, 424 U.S. 409, 430 (1976). Interviews of witnesses "are part of the duties of a prosecutor, and immune from liability under section 1983." Lebbos v. State Bar, 165 Cal. App. 3d 656, 666 (1985). See Myers v. Morris, 810 F.2d 1437 (8th Cir. 1987) (prosecutor absolutely immune from suit for interviewing children in connection with "the decision whether to initiate a prosecution [for child abuse] or in the preparation necessary to present a case"); Meyers v. Contra Costa County Department of Social Services, Slip Opinion (9th Cir. March 16, 1987) (social worker has absolute immunity from Section 1983 claims for actions "in the initiation of dependency proceedings" including "supervising an investigation"); Mazor v. Shelton, 637 F. Supp. 330, 332, 335 (N.D. Cal. 1986) (social worker absolutely immune under Section 1983 for acts that included interviewing a child and reporting his statements to the local sheriff).

The same fate must befall plaintiffs' third cause of action, which purports to set up a claim for conspiracy to violate plaintiffs' civil rights.[10] To the extent the claim

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[10]CII does not understand plaintiffs' second cause of action to allege a conspiracy to violate state law. There is no California cause of action for conspiracy. 4 B. Witkin, Summary of California Law, Torts § 31 at 2330-31 (8th ed. 1974). And, in any event, such a claim would be subject to the express immunity established by the Child Abuse Reporting Law.

asserts that CII was acting under color of state law because it was assisting the District Attorney, CII would be immune from suit under the Imbler doctrine. To the extent that plaintiffs are alleging that CII "conspired" in its private capacity and not under color of law, the claim fares no better. Under 42 U.S.C. Section 1985, the statute creating liability for civil rights conspiracies, a private conspiracy is not actionable unless it is motivated by "racial or other 'invidiously discriminatory animus.'" Ashelman v. Pope, 769 F.2d 1360, 1363 n. 5 (9th Cir. 1985), quoting Griffin v. Breckenridge, 403 U.S. 88, 102, 91 S. Ct. 1790, 29 L. Ed. 2d 338 (1971). Plaintiffs have not and cannot allege racial discrimination.

## V. PLAINTIFFS' RICO CLAIM ALLEGES NO FACTS AND THEREFORE STATES NO CAUSE OF ACTION

Plaintiffs' fifth cause of action is purportedly brought under the federal Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 et seq. Plaintiffs allege that "each of the Defendants engaged in a pattern of racketeering activity . . . in violation of 18 U.S.C. Section 1962 [sic]" (Amended Complaint ¶ 53.) This Court has twice sustained demurrers to this cause of action, the second time without leave to amend.[11] These rulings in favor of the ABC Television defendants were based on the following deficiencies:

> "First, because RICO was enacted to protect legitimate business from infiltration by organized crime

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[11] See Minute Orders dated February 9, 1987 and March 30, 1987, copies of which are attached as Exhibit C.

(see United States v. Turkette, 452 U.S. 576, 594 (1981)), a RICO plaintiff is required to plead and prove that the defendant engaged in racketeering through the conduct of an ostensibly legitimate business enterprise. See Sun Savings and Loan Ass'n v. Dierdorff, Slip Opinion No. 86-5811 (9th Cir. August 7, 1987). Here, all that plaintiffs plead is some mythical organization denominated the "McMartin Preschool Controversy" (First Amended Complaint ¶ 31.) This is plainly insufficient since the "enterprise" requirement may not be provided by vague allegations sounding of conspiracy. To the contrary, a RICO plaintiff must plead and prove that the RICO enterprise had an "ascertainable structure distinct from that inherent in the conduct of [the] pattern of racketeering [charged]." United States v. Bledsoe, 674 F.2d 647, 665 (8th Cir. 1982), cert. denied, 459 U.S. 1040 (1983); see In re National Mortgage Equity Corp. Mortgage Pool Certificate Securities Litigation, 636 F. Supp. 1138, 1160 (C.D. Cal. 1986).

Second, plaintiffs have failed to satisfy the equally rigorous requirement of pleading predicate acts. Racketeering activity actionable under RICO can only consist of acts "indictable under several provisions of Title 18 of the United States Code, see U.S.C. § 1961." Sun Savings, at 6. Section 1961 makes no reference to "leaking" information to a television reporter or any of the other conduct alleged in the first amended complaint. Indeed, the only conduct constituting a substantive criminal offense mentioned in the complaint is "obstruction of justice." But the justice allegedly obstructed was a state court criminal proceeding, hardly a basis for implicating 18 U.S.C. § 1503, the federal obstruction of justice statute, which requires conduct relating to a federal

proceeding. E.g., United States v. Baker, 494 F.2d 1262, 1265 (9th Cir. 1974).

Third, plaintiffs have yet to plead facts showing the requisite "pattern" of racketeering activity, which must consist of both "continuity" and "relatedness." See, e.g., Allington v. Carpenter, 619 F. Supp. 474, 477 (C.D. Cal. 1985). "To show continuity of racketeering activity, . . . the predicate acts must have occurred in different criminal episodes." 619 F. Supp. at 478. "The relatedness of the predicate acts is established through proof of common perpetrators, common methods of commission, or common victims." 619 F. Supp. at 477-78. None of the requisite facts to meet these pleading burdens are provided by plaintiffs' complaint.

These deficiencies were determined fatal to plaintiffs' RICO claims as against the ABC Television defendants. There being no basis for distinguishing CII, the same result should befall the amended complaint here.

## VI. PLAINTIFFS' FOURTH CAUSE OF ACTION, STYLED A CLAIM FOR "DECLARATORY RELIEF," FAILS TO STATE A CAUSE OF ACTION

Plaintiffs' fourth cause of action, brought against all defendants, alleges that plaintiffs have been sued in unspecified lawsuits by "numerous parents" of children who attended the McMartin Preschool. Plaintiffs allege that they have "been required to expend funds and effort to defend [such suits] which allege that Plaintiff is responsible for the traumas, emotional distress, sexual damage and other emotional harms suffered by

complainants' children . . . ." (Amended Complaint ¶ 26.) Plaintiffs then purport to seek indemnity from CII and the other defendants for plaintiffs' liability to the parents. (Id. ¶ 27.) Plaintiffs also seek "a declaration of this court of [the] respective rights, duties and liabilities of Plaintiff and Defendants with regard to complainants' claims, and indemnity." (Id. ¶ 28.)[12]

Plaintiffs' fourth cause of action is nearly unintelligible. No facts are alleged to suggest how CII could possibly be responsible for the "sexual damage" and "traumas" suffered by children at the McMartin Preschool. Equitable indemnity relates only to an apportionment of responsibility among tort-feasors jointly liable for the injured party's loss. See, e.g., Bear Creek Planning Committee v. Title Insurance & Trust Co., 164 Cal. App. 3d 1227, 1238 (1985). Plaintiffs plead no facts showing that CII was a joint tort-feasor with plaintiffs.

The only conduct alleged on CII's part is the making of allegedly erroneous child abuse reports to the District Attorney. For the reasons set forth elsewhere in this memorandum, plaintiffs' attempt to circumvent the absolute privileges of Penal Code Section 11172, Civil Code Section 47(2) and federal law by framing their cause of action as one for "indemnity" and "declaratory relief" should not be countenanced. No amendment is possible that could cure plaintiffs' pleading because the cause of action they propose simply does not exist. Accordingly, CII's demurrer to the fourth cause of action must be sustained without leave to amend.

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[12]The ABC defendants' demurrer to the identical count in the McMartin complaint was also sustained without leave to amend by this Court on March 30, 1987.

VII. CONCLUSION

For the reasons stated herein, the demurrers of defendants Children's Institute International and Kathleen MacFarlane should be granted without leave to amend.

DATED: _____, 1990

Respectfully submitted,

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